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No. 08-31

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In The Supreme Court of the United States

NUFARM AMERICA'S INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* TRANSBAS, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Export Clause in Article I, Section 9, Clause 5 of the United States Constitution is violated by assessment of duties on goods, pursuant to the North American Free Trade Agreement Article 303, the North American Free Trade Agreement Implementation Act and 19 C.F.R. § 181.53, because those goods have been exported to a NAFTA country after importation into a duty deferral program.

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INTEREST OF *AMICUS CURIAE*[1]

Transbas, Inc. is a manufacturer with its principal place of business near Billings, Montana, situated approximately 250 miles south of the United States-Canada border. Its facility occupies approximately twenty-seven acres outside of the city limits of Billings. Transbas employs approximately thirty-five employees. Transbas engages in the manufacture and formulation of herbicide for broadleaf weeds. It is one of only four manufacturing facilities in the United States capable of manufacturing and formulating herbicide for both early season/late season (cool weather) and mid-season (warm weather) application.

Because of its location, Transbas is ideally situated to serve the agricultural needs of the Western United States as well as the vast agricultural interests of Western Canada. Transbas regularly imports products into the United States and in the past, it has availed itself of the duty deferral program which is the subject of this controversy. It formulates product and resells it both domestically and to customers in Canada. Due to a close proximity to the Canadian border, Transbas

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[1] Counsel for both Petitioner and the United States received notice of intent to file this brief on July 28 and July 29, 2008, respectively. Counsel for Petitioner and the United States both consented to the filing of this brief on August 1, 2008. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel, made a monetary contribution to its preparation or submission.

experiences relatively lower costs than exporters more remotely located. A burden imposed on the export trade of the United States to Canada, whether *de jure* or *de facto*, affects Transbas' interests.

Transbas has two distinct interests which support a request for this Court to grant *certiorari*.

Transbas is currently a plaintiff in a case pending in the United States Court of International Trade, *Transbas, Inc. v. United States*, Court No. 04-00163, involving the identical issue as Petitioner raises herein. The final outcome of this case will guide the disposition of Transbas' case.

Although Transbas clearly seeks to protect a private economic interest, it also stands as an exemplar of a broader public constituency, namely those United States manufacturers, importers and exporters situated in close proximity to the borders of Canada and Mexico. These manufacturers, importers and exporters are specially affected by the statutory and regulatory scheme which imposes import duties upon the exportation of their goods to Canada or Mexico but not to any non-NAFTA country. The importation of product or material for domestic consumption subject to ordinary duties imposes no burden of Constitutional dimension on parties such as Transbas. owever, when material is imported initially exempt from duty because of its required export, and a duty is imposed thereafter upon exportation to Canada and Mexico, but not to other countries, such a circumstance impacts the scope of commercial activity of the affected parties. For example, Transbas believes that since this

statutory scheme was implemented, it has lost at least two customers because of the duty burden, one of whom simply began sourcing the formulated product off-shore.

SUMMARY OF THE ARGUMENT

The Court should grant *certiorari* because the Federal Circuit's decision resulted in an unprecedented restrictive application of the Export Clause. The drafters intended the Export Clause to provide unqualified protection from taxation for goods in export transit, particularly if such burdens resulted in regional discrimination. This Court's precedent mandates a broad interpretation of the Export Clause. This broad interpretation requires an inquiry into whether goods entered into a duty deferral program are "Articles exported." The importance of correcting the Federal Circuit's narrow restrictive interpretation is demonstrated by the negative effect of the unconstitutional duties on the substantial export trade from the United States to Canada and Mexico, its two largest export markets.

REASONS FOR GRANTING THE PETITION

I. This Court Should Review and Reverse the Federal Circuit's Unprecedented Restrictive Application of the Export Clause.

A. By Failing to Provide the Unqualified Protection of the Export Clause Intended By The Drafters and Recognized By This Court, The Federal Circuit's Decision Contradicts Established Precedent.

The history of the Export Clause, Article I, Section 9, Clause 5 of the United States Constitution and the jurisprudence of this Court require a broad construction of the Export Clause.

This Court has consistently held that the Export Clause is unparalleled with respect to other Constitutional limitations on Congress' taxing power, as the Export Clause is a "simple, direct, unqualified prohibition on any taxes or duties . . . ." *United States v. United States Shoe Corp.*, 523 U.S. 360, 368 (1998). The history of the Clause is firmly rooted in fears of discrimination against certain States: "The Framers sought to alleviate . . . concerns [that Northern States would tax exports to the disadvantage of Southern States] by completely denying to Congress the power to tax exports at all."

Id. (quoting *United States v. International Business Machines Corp., (IBM)*, 517 U.S. 843, 861 (1996)). Many delegates "worried about export taxation's potential for destroying the union through targeted duties."[2] Delegate Elbridge Gerry of Massachusetts expressed his concerns that "the legislature could not be trusted with such a power," which "might be exercised partially, raising one and depressing another part of [the Country]."[3]

Attempts to weaken the Export Clause were rebuffed.[4] One unsuccessful attempt would have permitted export taxation only for the regulation of trade, prohibiting taxation that was meant solely to raise revenue.[5] Another amendment which would have allowed the government to tax exportations "in extraordinary circumstances" was also rejected.[6] The resultant Export Clause is, and remains, an inflexible blanket prohibition on all export taxes.

An Export Clause analysis must be wide, demanding scrutiny of anything which operates as a duty on exports. In 1861, in *Almy v. California* this Court held that a California state stamp tax upon

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[2]ERIK M. JENSEN, THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 31 (2005).

[3]*Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 350 (Max Farrand ed., Yale University Press 1937) (1787)).

[4]*Id.* at 34.

[5]*Id.*

[6]*Id.* at 35.

bills of lading for export from the state was "repugnant" to the Export Clause. *Almy v. Cal.*, 65 U.S. 169, 175 (1861). The Court broadly construed the Export Clause, requiring a thorough examination of the factual circumstances surrounding the tax. The *Almy* Court stated that "a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading . . . is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." *Id.* at 174.

Later, in *Fairbank v. United States*, 181 U.S. 283, 291 (1901), this Court echoed the concerns of the Framers, noting that "[t]he power to tax is the power to destroy." The *Fairbank* Court, invalidating a stamp tax on foreign bills of lading, broadly construed the Export Clause as a "restriction on the power of Congress" which "should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which . . . destroys the spirit and purpose of the restriction imposed." *Id.* at 290. This deference to the "spirit" and "purpose" of the Export Clause requires in no uncertain terms a broad examination of any direct and indirect effects on exported goods. In the words of this Court, "what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." *Id.* at 294.

By failing to apply the unqualified protection of the Export Clause, the Federal Circuit's decision permits the very type of regional discrimination the

Export Clause was originally intended to prevent. The statutory and regulatory scheme offends the very purpose of the Export Clause as conceived by the drafters, by failing to protect particular states or regions from discriminatory burdens upon their export commerce. The application of the deferred duties, triggered only upon exportation of goods to Canada or Mexico, has a particularly harmful effect since it impacts disproportionately those businesses situated along the borders of Canada and Mexico by reducing their competitive advantage arising out of their proximity to the border.

The Federal Circuit's determination that the tax is imposed on imported goods but assessed later upon exportation, without considering whether it is also imposed on goods in export transit, cannot pass Constitutional muster. A broader inquiry, necessitated by this Court's broad interpretation of the Export Clause, is required in this instance. Once the Federal Circuit determined the duty was "imposed" upon entry of the goods into the duty-deferral program and was thereafter merely "assessed" at the time of exportation, *Nufarm America's, Inc. v. United States*, 521 F.3d 1366, 1369 (Fed. Cir. 2008), it ceased further analysis. It should have examined whether the exaction was nonetheless a burden on exportation because the goods themselves were in some stage of export

transit. Because the Export Clause requires a broad interpretation, based upon the legislative history of the Export Clause and this Court's precedent, the Federal Circuit failed to engage in a more rigorous analysis to ascertain whether the exaction nonetheless constituted a duty on "Articles exported."

B. A Broad Interpretation Of The Export Clause Requires An Inquiry Into Whether Goods Entered Into A Duty Deferral Program Are "Articles Exported."

Amicus is in full agreement with Petitioner that the Federal Circuit decision narrowed significantly this Court's interpretation of the Export Clause. Under the particular statutory and regulatory scheme involved in this case, and as alluded to by Petitioner (Pet. 15-16.), Petitioner's goods, from the very instant they entered the duty deferral program, were branded as goods destined

for exportation *somewhere*.[7] They could not lawfully remain in the United States beyond the period specified in the tariff. U.S. Note 1(a), Chapter 98 Subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202 (2008 ed.). Petitioner frames this issue in terms of whether the duties, even if an import tax, were nevertheless a tax on goods in export transit or functionally the same as a tax on exports. (Pet. 9.)

This Court has broadly exempted from federal taxation both export goods and services and activities closely related to the export process. At

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[7] The characterization of the scheme as a *duty* deferral program should not necessarily guide the result. As this Court noted in *United States Shoe Corp.* (with reference to the inquiry of whether the Harbor Maintenance Tax is a "tax" or a "fee"), " the crucial question is whether the HMT is a tax on exports in operation as well as nomenclature . . . ." 523 U.S. at 367. It is true that if the goods in question were entered for ordinary consumption, a duty would have been lawfully imposed and assessed. However, once the goods were entered into the duty deferral program, both their relationship to an "export transaction" and the character of the liability, changed. Had the goods remained in the United States in violation of the terms of the duty deferral program, the importer would have been responsible to only pay contractual liquidated damages under its import bond, not duty. 19 C.F.R. § 10.39(d)(1) (2008). According to the statute, an importer is only required to pay duties *qua* duties for waste which remains in the U.S. U.S. Note 2(b)(ii), Chapter 98 Subchapter XIII, HTSUS. Imported goods are either subject to duty or exempt. General Note 1, HTSUS. In this case, from the time the goods were entered into the duty deferral program, they were no longer subject to duty if exported to any destination in the world except Canada and Mexico and then, only upon the act of exportation to either of these destinations. 19 C.F.R. § 181.53(a)(2) (2008).

the same time, it has sought to limit the term "Articles exported" in order to permit the imposition of taxes on pre-export goods and services. *IBM*, 517 U.S. at 846. In light of the circumstances of this case, the Federal Circuit was required to engage in an analysis of the type suggested in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923). As Justice Holmes noted in *Spalding*, "[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin." *Id.* at 69.

In this case, given that the goods were temporarily brought into the United States for the express purpose of performing some operation prior to a required exportation, it was incumbent upon the Federal Circuit to engage in a *Spalding* analysis in order to determine whether the entry into the duty deferral program was in fact the beginning of the export process or so closely associated with the lawfully required act of exportation that, in Petitioner's words, the duties, even if an import tax, were nonetheless a tax or burden on export goods. Having concluded the exaction was a deferred import duty, the Federal Circuit assumed it could not be a tax or duty on "Articles exported" under the Export Clause. A *Spalding*-type inquiry, essentially examining when the goods first entered the stream of export commerce for purposes of the exaction, would have produced a different result.

II. The Unconstitutional Duties Assessed Under The Regulations Have A Negative Economic And Commercial Impact On The Substantial U.S. Export Trade To Canada And Mexico.

Petitioner notes that the regulation of duty in this case was expressly intended to restrict trade with Canada and Mexico. (Pet. 3.) This unconstitutional regulation of export trade has a substantial commercial and economic impact on the two biggest United States export markets. The constitutional issue presented in this case is real and is ripe for adjudication.

Both Petitioner and *amicus*, as well as similarly situated importers, exporters and manufacturers, have a strong economic interest in the final decision, in terms of the substantial exactions already paid and the effects the final decision will have on their future business decisions.

On a broader level, the national importance of the issue pending for *certiorari* is illustrated by the staggering amount of goods and services which pass though United States borders for export to Mexico and Canada. An unknown, but surely significant, amount of these goods are produced, or could be produced, from foreign materials imported through a duty deferral program such as the one at issue here.

The negative implications of the Federal Circuit decision cut a wide swath across geographic regions and industries. Most seriously affected are the border states and the manufacturers, exporters, importers, distributors, suppliers, etc. who depend

upon exports to their northern and southern neighbors for much of their economic lifeblood and whose physical proximity to the border gives them a competitive edge which is eroded by any burden on the exportation of their goods.

In 2007, the United States exported more goods to Canada and Mexico than to any other nations, ranking first and second respectively in total exports.[8] The U.S. exported $248.9 billion in goods to Canada in 2007, 21.4% of all goods exported from the U.S.[9] The U.S. exported $136.5 billion in goods to Mexico, comprising 11.7% of total exports.[10] In sum, 33.1% - one third - of the value of the United States' export trade in goods went to Canada and Mexico. To gain perspective on these figures, China, the number three destination, received U.S. exported goods worth $65.2 billion - 5.6% of total U.S. exports.[11]

Perhaps even more telling is the level of export trade in 2007 by the individual states with Canada and Mexico. Among the fifty states, Canada

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[8] U.S. Census Bureau Website, Foreign Trade Statistics, "Top Trading Partners - Total Trade, Exports, Imports: Year-to-Date December 2007," *available at* http://www.census.gov/foreign-trade/statistics/highlights/top/top0712.html (last visited Aug. 4, 2008).

[9] *Id.*

[10] *Id.*

[11] *Id.*

is the leading export market for thirty-six states.[12] Canada or Mexico is the leading export destination for eleven of the fifteen border states (whose land masses touch foreign soil).[13] For eight of the fifteen border states, exports to Canada or Mexico represented 25% or more of the states' total exports.[14]

The Court's decision to grant *certiorari* is of critical importance for the businesses whose economic well-being is tied to a flourishing export trade with Canada and Mexico.

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[12]U.S. Department of State Website, Bureau of Western Hemisphere Affairs, "Background Note: Canada," http://www.state.gov/r/pa/ei/bgn/ (last visited Aug. 4, 2008).

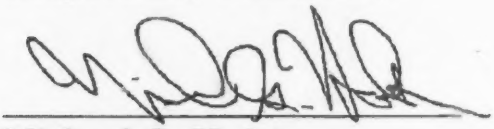
[13]U.S. Census Bureau Website, Foreign Trade Statistics, "State by 6-Digit HS Code and Top Countries: State by Top 25 Commodities and Countries: 2004 - 2007," *available at* http://www.census.gov/foreign-trade/statistics/state/data/index.html (last visited Aug. 4, 2008). Canada shares a land border with eleven states, from west to east: Alaska, Washington, Idaho, Montana, North Dakota, Minnesota, Michigan, New York, Vermont, New Hampshire and Maine. Mexico shares a land border with four states, from west to east: California, Arizona, New Mexico and Texas.

[14]*Id.*

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, *certiorari* should be granted.

Respectfully submitted,



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